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STATEMENT OF DANIEL L. SIEGEL, CALIFORNIA SUPERVISING DEPUTY ATTORNEY GENERAL, IN OPPOSITION TO H.R. 4772

I appreciate this opportunity to testify on behalf of California Attorney General Bill Lockyer to explain why the Attorney General strongly opposes H.R. 4772, the Private Property Rights Implementation Act of 2005. The bill seeks to increase the role of the federal government in matters of traditional state and local concern. For that reason, forty Republican and Democratic State Attorneys General, including former California Attorney General Dan Lungren, strongly opposed H.R. 1534, the initial predecessor to H.R. 4772, and a like number of State Attorneys General from both parties strongly opposed the next version of that measure -- H.R. 2372. (See attached letters in opposition to those bills.)

H.R. 4772 not only incorporates the procedural changes of its predecessor bills that have garnered wide-spread opposition. It also contains new provisions that seek to "clarify" (change) judicial interpretations of the constitution. Those provisions, however, are inconsistent with basic separation of powers requirements, and therefore present an additional reason for rejecting this bill.

The following discussion specifically considers (1) why, as a matter of policy, H.R. 4772 represents an unnecessary federal intrusion into matters of state and local concern; (2) why the measure is unnecessarily divisive – supporters going so far as to characterize it as a "hammer to the head" of state and local governments; (3) why, if enacted, H.R. 4772's ripeness provisions would fail to accomplish its objectives; (4) why the provisions in this bill that did not appear in prior versions – measures that are characterized as the "clarification" of constitutional law -- are contrary to separation of powers principles; and (5) why any improvements to the local regulatory process must be developed at the state and local level.

I. H.R. 4772 IS AN UNNECESSARY FEDERAL INTRUSION INTO STATE AND LOCAL ADMINISTRATION OF LAND USE AND REAL PROPERTY LAWS

H.R. 4772 represents a significant federal intrusion into state and local administration of real property and land use laws, which are areas that have always been recognized as matters of intrinsic state and local concern. See, e.g., *Lake Country Estates* v. *Tahoe Regional Planning Agency*, 440 U.S. 391, 402 (1979); *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 565 n.17

(1994). Although cast as legislation that eases procedural hurdles in federal court, H.R. 4772 will have a powerful impact on land use planning by local governments and will "federalize" many disputes that are now being worked out at the state or local level. The reasons why should be readily understood.

H.R. 4772 facilitates and encourages the filing of lawsuits in federal court. It does this in two primary ways. First, the bill provides that a taking claim brought under the Federal Civil Rights Act, 42 U.S.C. § 1983, shall be ripe for adjudication upon a final decision rendered by any person acting under color of state law that causes actual and concrete injury. The bill then goes on to define a "final decision," essentially providing that a final decision has been reached if the applicant has made one meaningful application and has applied for one appeal or waiver, unless (1) an appeal or waiver is unavailable, (2) the governmental agency cannot provide the relief requested, or (3) reapplication would be futile. Second, H.R. 4772 provides that persons may bring taking claims under section 1983 without first having sought compensation in state court. H.R. 4772 thus seeks to lessen or remove the barriers to federal court taking claims found in cases such as *Williamson County Regional Planning Com.* v. *Hamilton Bank*, 473 U.S. 172, 194 (1985).

The existing procedural requirements tend to insure that disputes involving state and local planning issues will be decided below the federal level. That is good policy. As the Supreme Court recently reiterated: "state courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations." *San Remo Hotel v. City and County of San Francisco*, 162 L.Ed. 2d 315, 339 (2005). The "strong policy considerations [that] favor local resolution of land-use disputes" (*Taylor Inv., Ltd. v. Upper Darby Township*, 983 F.2d 1285, 1291 (3d Cir. 1993)), however, would be undermined by eliminating the requirements set forth in cases such as *Williamson County*. Prior to joining the Supreme Court, Justice Alito therefore explained that the federal judiciary should avoid procedural rules under which it could be "cast in the role of a zoning board of appeals." *United Artists Theatre Circuit, Inc. v. Twp. of Warrington*, 316 F.3d 392, 402 (2003) (internal citation and quotation marks omitted).

H.R. 4772, however, would cause more taking claims to be filed in general and would encourage them to be filed in federal court. The broadening of the final decision requirement would mean that more lawsuits may be filed because developers would no longer need to explore project alternatives in the manner required under existing law. The elimination of the requirement that a landowner first seek compensation in state court would mean that taking claims can be filed directly in federal courts. And because H.R. 4772's "final decision" test would only apply in federal court, developers would have a much greater incentive to file in federal courts. Thus, it is no exaggeration to say that H.R. 4772 will increase taking litigation and "federalize" local land use disputes.

II. H.R. 4772 PROMOTES AN ADVERSARIAL RELATIONSHIP BETWEEN GOVERNMENT AND DEVELOPERS

The fact that H.R. 4772's provisions will promote a hostile, rather than a thoughtful and balanced process, was actually presented as a reason for adopting, rather than rejecting, a predecessor to

H.R. 4772. In 2000, the chief lobbyist for the National Association of Home Builders, Jerry Howard, declared that **"[t]his bill will be a hammer to the head of these [state and local] bureaucracies."** See the National Journal's Congress Daily AM (March 14, 2000).

This threat is very real. Most local governments are small and have limited resources. As the Mayor of Ames, Iowa explained, on Behalf of the National League of Cities in opposing a predecessor to H.R. 4772, there are almost 36,000 cities and towns in the United States. (See attached testimony of Larry Curtis, dated October 7, 1997.) Of those, 97 percent have populations of under 25,000. Indeed, over half have populations smaller that 1000. If H.R. 4772 is enacted, these small cities and towns will be faced continually with a serious dilemma: they will be induced to approve potentially harmful development that they might otherwise have conditioned or denied, or they will be required to undertake the expense of substantial federal litigation. The costs of defending these lawsuits, in turn, will indirectly affect the amount of resources that local governments can devote to planning in the future.

We do not believe that a hammer to the head approach is appropriate. It ignores the reality that local planners each day are asked to interpret complex zoning and land use plans and comply with state environmental disclosure laws, and then apply these laws and policies to sophisticated development schemes with a broad range of physical and social impacts. Local governments, in making their ultimate use determinations, must balance the command of the law and the wishes of the developer with the concerns of other public and private interests who may be affected by the project. Development projects often must undergo multiple levels of administrative review, which allows a project to receive the full attention it deserves by specialized decision makers, as well as afford developers an administrative recourse when they are displeased with the outcome.

It is inevitable that disagreements over policy and the interpretation of the law will occur during this process, and that those disagreements will add to the time and expense associated with it. While individual planners justifiably may be criticized in individual cases, the dissatisfaction of many developers about cost and delay may result from a general skepticism about the value of modern land use and environmental regulation, as well as a reluctance to accept that there is a reciprocity of benefits to be gained from the regulatory process. These larger concerns about the wisdom and administration of local land use laws and policies must, of course, be directed to state and local governments. Political and philosophical disputes about local land use matters are not a federal concern, and it is inappropriate for the federal government to intervene by facilitating federal lawsuits that will alter the balance in the local regulatory process.

III. H.R. 4772 WOULD NOT CORRECT THE RIPENESS PROBLEMS THAT IT PURPORTS TO SOLVE

H.R. 4772's attempted modification of the finality requirement and its elimination of the compensation requirement would likely be ineffective. Moreover, H.R. 4772 would create even more uncertainty in the law and frustration for those who support its enactment.

Existing Ripeness Doctrine. The Supreme Court's cases "uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." *MacDonald, Sommer and Frates* v.*County of Yolo*, 477 U.S. 340, 351 (1986). There are two components of the ripeness doctrine. A landowner

alleging a taking in federal court must show that (1) the government entity has issued a final and authoritative decision with regard to the application of its regulations to the proposed use of the landowner's property, and (2) the landowner has requested compensation through state procedures. *Williamson County,* 473 U.S. at 194; see *MacDonald, Sommer and Frates,* 477 U.S. at 348. In order to establish that the agency has made its "final decision" for the purposes of the ripeness doctrine, the applicant must allege an initial rejection of a development proposal *and* that there has been a definitive action by the agency indicating with some specificity what level of development will be permitted on the property. *MacDonald, Sommer and Frates,* 477 U.S. at 351. More recently, the Supreme Court explained that "a takings claim is likely to have ripened" where it either "becomes clear that [an] agency lacks the discretion to permit any development, or **the permissible uses of the property are known to a reasonable degree of certainty.**" *Pallazzolo v. Rhode Island,* 533 U.S. 606, 620 (2001), emphasis added.

The Modification of the Finality Requirement Would Be Ineffective. Dissatisfied with these existing rules, the advocates of H.R. 4772 seek to obtain certainty through a mechanical test for determining when a taking claim is ripe. Presumably, a federal court would be required to decide a taking case on the merits if the landowner could demonstrate compliance with the test, regardless of how far along the administrative process had actually progressed.

Proponents of H.R. 4772 seriously underestimate the force of the ripeness doctrine. They perceive the doctrine as a procedural obstacle created by the courts to avoid deciding taking claims. By reducing the federal courts' discretion to determine finality, the argument goes, access to the federal courts will improve and many more taking claims will be decided. This view of finality misperceives the critical role that the ripeness doctrine plays in the adjudication of taking claims.

Finality in the context of a taking claim has two different but overlapping dimensions. First, it serves to define when a taking claim is ripe for adjudication. Second -- and this is the aspect overlooked by H.R. 4772's adherents -- it helps define whether a taking has in fact occurred. That is, there can be no injury and therefore, no taking, unless the government has taken final action. Furthermore, without a truly final decision, a court is simply not in a position to evaluate the nature of governmental action said to effect a taking.

This second dimension of finality is evident in the cases. Consider how the Supreme Court described the need for finality in *Williamson County*:

> Our reluctance to examine taking claims until such a final decision has been made is compelled by the very nature of the inquiry required by the Just Compensation Clause . . . . [The factors specified in the *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104 (1978)] *cannot be evaluated* until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question. *Williamson County*, 473 U.S. at p. 191 (emphasis added). Later, the Court said:
>
> It is sufficient for our purposes to note that whether the "property" taken is viewed as the land itself or respondent's expectation interest in developing the land as it wished, *it is impossible to determine* the extent or the loss or interference until the

> Commission has decided whether it will grant a variance from the application of the regulations. *Williamson County*, 473 U.S. at 192 (emphasis added).

The Court made a similar observation in *MacDonald* when, in rejecting a taking claim as unripe, it stated:

> It follows from the nature of a regulatory taking claim that an essential prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted on the subject property. *A court cannot determine* whether a regulation has gone "too far" unless it knows how far the regulation goes. . . . *No answer is possible* until a court knows what use, if any may be made of the affected property. *MacDonald, Sommer and Frates,* 477 U.S. at 348, 350 (emphasis added).

The final decision requirement therefore is essential to determining whether a taking has occurred and whether there has been injury in fact. This has important implications for H.R. 4772 and explains why H.R. 4772's imposition of arbitrary standards for determining ripeness is unlikely to effect any significant change.

How might a federal court analyze such a taking claim under H.R. 4772's finality standards? There are two likely possibilities. First, a court may find that H.R. 4772 impermissibly dictates the manner in which the court must decide cases. See *Clark* v. *Valeo,* 559 F.2d 642, 650-651 n.11, aff'd, 431 U.S. 950 (1977) ("To the extent this language may be read as suggesting a view that Congress may 'command' the judiciary to act contrary to the rules relative to ripeness the Supreme Court has developed 'for its own governance in the cases confessedly within its jurisdiction' . . . we respectfully disagree," citing *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 346 (Brandeis, J., concurring)). Given that the Supreme Court has said that "it is impossible" and that it "cannot determine" whether a taking has occurred unless there has been a truly final decision that informs the court as to how far the regulation goes, it is questionable whether a court may be compelled to reach a decision on the merits by legislation that arbitrarily determines what constitutes a final decision. If "no answer is possible," then no answer is possible, regardless of legislative insistence that the courts look for one. Moreover, a court in these circumstances might question whether H.R. 4772 impermissibly intruded on the judiciary's paramount authority to interpret the Constitution, at least to the extent that H.R. 4772 purports to redefine the manner in which a court must decide the merits of a constitutional taking claim.

Second, a court might construe H.R. 4772 narrowly and assume that there was no intent to dictate how the courts should analyze a taking claim. For the reasons already discussed, however, the court still would have to analyze whether an agency had rendered a truly final decision to determine the impact of government's regulations and whether a taking has occurred. In essence, if government's action was not truly final, the court would likely address the action the same way it analyses a facial claim. Facial challenges assert that a regulation will constitute a taking no matter how it is applied; its "mere enactment" constitutes a taking. See *Suitum v Tahoe Reg'l Planning Agency* (1997) 520 U.S. 725, 736 (1997). No final decision is required before bringing these claims because, as the Ninth Circuit explains, facial challenges "by definition, derive from the ordinance's enactment, not any implementing action on the part of governmental authorities." *Ventura Mobilehome Communities Owners Ass'n v City of San Buenaventura,* 371 F3d 1046,

1052 (9th Cir 2004). Proving a facial claim, however, is almost impossible, due to the uncertainty as how the governmental body will actually act. The Court therefore refers to this type of challenge as an "uphill battle." See *Tahoe-Sierra Preservation Council v Tahoe Reg'l Planning Agency*, 535 U.S. 302, 320 (2002). A litigant attempting to establish a taking where the governmental entity's action is not truly final would be confronted with an equally daunting challenge.

The Elimination of the Compensation Requirement Would Be Ineffective. H.R. 4772 also attempts to modify existing standards by eliminating the second prong of *Williamson County* which requires that taking claimants demonstrate that they have unsuccessfully attempted to obtain compensation using state procedures. The constitutional issues raise by the elimination of this requirement was the subject of much discussion with regard to H.R. 1534. As critics have pointed out, eliminating the procedural hurdle does not solve the problem because the compensation requirement is an element of a cause of action for an uncompensated taking. The Court stated in *Williamson County*:

> If a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation . . . . [B]ecause the Fifth Amendment proscribes takings without just compensation, no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a section 1983 action. *Williamson County*, 473 U.S. at 195, 195 n. 13.

The Supreme Court has frequently reaffirmed *Williamson County* on this point. See *Suitum* v. *Tahoe Regional Planning Agency,* 520 U.S. 725, 733-734 (1997); *Presault* v. *ICC,* (1990) 494 U.S. 1, 11 (1990); *MacDonald, Sommer and Frates,* 477 U.S. at 350. In *City of Monterey* v. *Del Monte Dunes, Ltd.*, 526 U.S. 687 (1999), the Court again emphasized the constitutional underpinning of the requirement. The Court first noted that the case was filed before California courts recognized a remedy for temporary takings. *Id.* at 710. The Court then explained, however, that "had an adequate postdeprivation remedy been available, Del Monte Dunes would have suffered no constitutional injury from the taking alone." *Ibid.*

H.R. 4772 Would Create More Uncertainty in the Law. In addition to the potential constitutional deficiencies just discussed, the language of H.R. 4772 contains a number of interpretive problems that will lead to even further uncertainty. As one example, the measure requires that applicants obtain a "definitive" decision, in addition to following other specified administrative steps for obtaining a final decision. "Definitive," however, is not defined. In *Williamson County*, the Court used the term "definitive" interchangeably with "final." *Williamson County*, 473 U.S. at 191, 192. Thus, the reference to a "definitive" decision in the bill could be read as importing the very judicial finality standards that the measure tries to avoid in going on to specify specific administrative steps that need to be taken. This may not be the drafters' intent, but it leaves uncertain exactly what "definitive" means.

As another example, the bill excuses the need to seek a waiver or appeal if it "cannot provide the relief requested." This phrase might be read to excuse a waiver if the developer asserts the need

for monetary relief (because agencies ordinarily have no power to grant relief), or if the developer seeks some other extreme relief outside the scope of what the agency is authorized to provide. Similar concerns have been raised about the use of the word "infringed" in comments concerning H.R.4772's predecessor bill – a use that continues with H.R. 4772.

In summary, H.R. 4772 would not cure any of the perceived problems with the regulatory system or the access of landowners to the federal courts. Instead, it would create more uncertainty and more unproductive, protracted and expensive litigation.

IV. THIS BILL ADDS "CLARIFICATION" PROVISIONS THAT DID NOT APPEAR IN PRIOR BILLS AND THAT ARE NOT PERMITTED UNDER SEPARATION OF POWERS PRINCIPLES

Finally, unlike its predecessor bills, H.R. 4772 contains a section that purports to be a "clarification" of various requirements for establishing constitutional violations. (Section five of the bill.) For example, the bill seeks to modify the existing "parcel as a whole" rule under which the courts analyze the owner's entire property interests, rather than the particular portion of the property that is regulated, to determine whether the impact of the regulation on a parcel is "so onerous" as to amount to a taking. See *Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency,* 535 U.S. 302, 331 (2002) ("in regulatory takings cases we must focus on 'the parcel as a whole' [internal citation omitted]"); *Lingle v. Chevron U.S.A., Inc.*, 161 L.Ed.2d 876, 887 (2005) (restriction must be "so onerous" as to be the functional equivalent of a direct appropriation of the property). The U.S. Court of Federal Claims, which sees a large number disputes in which the definition of the "parcel" is important, explains that the relevant parcel is determined by reviewing various factors concerning individual lots, such as:

> the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, the extent to which the [regulated] lands enhance the value of remaining lands.

Cane Tennessee, Inc. v U.S., 60 Fed. Cl. 694, 700 (2004), citing *Ciampitti v U.S.,* 22 Cl. Ct. 310, 318 (1991). In some cases, that analysis leads courts to conclude that a number of lots in a subdivision should be considered as a whole. See, for example, *District Intown Props. Ltd. v. District of Columbia*, 198 F.3d 874, 880 (D.C. Cir. 1999), where the Court expressly approved of the lower court's determination that "nine lots should be treated as one parcel for the purpose of the court's takings analysis."

H.R. 4772, however, seeks to change the law. It states that each "lot" in a subdivision is the only relevant parcel for takings purposes if the lot is treated as an "individual property unit" under state law.

Similarly, the bill allegedly clarifies the test that courts are to apply when they review substantive due process challenges concerning property rights disputes. Section five of the bill states that the challenged action "shall be judged as to whether it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." As Supreme Court Justice Alito emphasized while he

was a Court of Appeals justice, however, that is not the constitutional test. Rather, the test is whether the challenged action "shocks the conscience." *United Artists Theatre Circuit, Inc. v. Twp. of Warrington*, 316 F.3d 392, 402 (2003). Under that standard, it is "insufficient" to allege that local government "arbitrarily applied" a land use restriction. *Ibid.*

These Congressional interpretations of constitutional requirements are contrary to basic separation of powers notions. As the Supreme Court explains, under the "vital principles necessary to maintain separation of powers and the federal balance," the courts, not Congress, have the authority to interpret the constitution. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997). In that case, the Court rejected Congress' attempt to change the test for determining whether a government regulation violated the First Amendment's protection of the free exercise of religion. In the same manner, H.R. 4772 impermissibly attempts to change tests for determining whether a government regulation violates the takings or substantive due process protections of the Constitution.

V. ANY CHANGE TO THE REGULATORY PROCESS OF LOCAL GOVERNMENTS SHOULD OCCUR AT THE STATE AND LOCAL LEVEL

Given the complexity of modern life, it is inevitable that there will be "horror stories" of individual experience with the courts or the regulators. These stories are unfortunate but understandable. Sophisticated land use and environmental regulation is necessary to insure the orderly use of land and resources and to minimize human impact on a fragile environment. Moreover, the overburdened judicial process is lengthy, especially where it becomes necessary to employ appellate review. And, because human beings of varying degrees of competence and diligence administer these systems, the results sometimes will be uneven.

When compared to the many thousands of land use decisions made every year by the nation's 35,000 cities and towns, however, and the typical length of time that the judicial process requires, the stories of extreme delay are isolated. There is no evidence that the land use system does not work reasonably well or that it has failed to improve the quality of life. Nevertheless, government needs to remain aware that its actions affect the lives of real people and to minimize, where reasonably possible, the time and inconvenience of going through the process. But there is no justification for a federal response to remedy these relatively few cases, especially where H.R. 4772 is unlikely to work as intended and where federal interference would alter the land use process by upsetting the existing balance between government and the regulated community.

If changes need to be made, they should be made at the state and local level. In California, many changes to expedite the process have already been made. The Permit Streamlining Act, Cal. Gov. Code §§ 65920 et seq., requires that agencies decide the completeness of applications and approve or disapprove projects within specified time limits, or else risk that the application will be deemed approved by operation of law. The California Coastal Act requires that hearings be conducted within 49 days of the filing of an application, Cal. Pub. Resources Code § 30621, and, to keep the process moving, provides that any legal challenges be brought within 60 days after the Coastal Commission's decision, *id.*, § 30601. The Coastal Act also forbids the taking of

property, *id.,* § 30010, and gives the Commission the flexibility to prevent a taking in situations where strict application of its substantive policies might have resulted in the denial of all economically viable use.

Much has been done and still can be done to streamline the process. The impetus for change, however, must be directed at the state and local level. H.R. 4772 only tinkers at the margins of the perceived problems. This federal intrusion into local land use administration is unjustified and diverts attention from the areas where this much time and energy would be better spent.

CONCLUSION

H.R. 4772 offends principles of federalism because it injects the federal courts into resolving local land use disputes, matters of traditional state and local concern that typically are resolved in state courts. H.R. 4772 also upsets the balance between local governments and landowners by facilitating lawsuits and the threats of lawsuits by disappointed developers. It will change the dynamics of the land use process by encouraging both developers and government to act with litigation in mind, rather than promoting conciliation and compromise in the regulatory process. The need for this divisive federal incursion into local affairs is unproven. Moreover, the "procedural" problems that H.R. 4772 purports to correct, and its "clarification" of takings law are linked to the very core of the taking doctrine, a constitutional matter within the province of the courts. This legislation would create even more uncertainty than is believed to exist in the present system.

For these reasons, the California Attorney General strongly opposes H.R. 4772. Thank you for the consideration of our views.

STATE OF CALIFORNIA

OFFICE OF THE ATTORNEY GENERAL

BILL LOCKYER
ATTORNEY GENERAL

The Honorable Henry Hyde
Chairman, Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515-6216

RE: H.R. 2372, the Private Property Rights Implementation Act of 1999

Dear Chairman Hyde:

On behalf of the undersigned State Attorneys General, I am writing to express our strong opposition to H.R. 2372. This bill is substantially the same as H.R. 1534, which many State Attorneys General opposed in their letter to you of September 24, 1977.

Like its predecessor, H.R. 2372 represents an unwarranted federal intrusion into state land use regulation. It permits landowners to sue local governments for regulatory takings before the regulatory process is complete and before they have had a sufficient opportunity to render a final decision on a proposed project. H.R. 2372 also allows landowners to sue local governments directly in federal courts, without first complying with state procedures for obtaining just compensation. Because H.R. 2372 accomplishes its objectives by modifying the Supreme Court's interpretation of a constitutional doctrine, there are serious questions about whether the bill is a permissible exercise of Congressional authority.

The primary purpose of H.R. 2372 is to alter the requirements developed by the federal courts to determine whether a taking claim is ripe for adjudication. Under existing taking doctrine, a landowner in federal court must show that (1) the government agency has issued a final and authoritative decision regarding the application of its regulations to the proposed use of the landowner's property and (2) the landowner has requested and been denied compensation

through the procedures provided by the State. *Williamson County Regional Planning Com. v. Hamilton Bank*, 473 U.S. 172, 194 (1985); see *MacDonald, Sommer and Frates* v. *County of Yolo*, 477 U.S. 340, 348 (1986). H.R. 2372 seeks to modify the ripeness doctrine in two significant ways.

First, H.R. 2372 defines "final decision" in a manner that relaxes the judicially-imposed requirements for demonstrating that a landowner has obtained an agency's final and authoritative decision on the use of the landowner's property. H.R. 2372's broad definition of "final decision" is unwise. Agencies often are forced to deny projects that are harmful to the public, even though they might have approved a more thoughtful proposal. Noting that "rejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews," the Supreme Court has held that refinement of a project and additional applications are often necessary to determine an agency's definitive position. *MacDonald, Sommer and Frates, supra*, 477 U.S. at 351, 353 fn.9. By arbitrarily limiting the number of applications that a landowner must make to demonstrate a ripe taking claim, H.R. 2372 forces local government to defend itself from taking claims on an incomplete record and before the regulatory process is truly over.

Second, H.R. 2372 proposes to eliminate the second prong of *Williamson County* by declaring that "a final decision shall not require the party seeking redress to exhaust judicial remedies provided by any State . . . ." By providing landowners the opportunity to bypass state courts, H.R. 2372 invites forum shopping and may have the unintended effect of inducing local governments into approving potentially harmful development out of fear of protracted federal litigation. This extraordinary federal intervention into the States' administration of their real property and land use laws is all the more puzzling because there is no evidence that state courts have been unwilling or unable to protect private landowners with meritorious claims.

Policy considerations aside, this effort to eliminate the second prong of *Williamson County* may be unconstitutional. Because the Fifth Amendment proscribes takings without just compensation, no constitutional violation occurs until a landowner has unsuccessfully attempted to obtain compensation through the procedures provided by the State. *Williamson County*, 473 U.S. at 195. It is doubtful whether Congress may modify substantive aspects of the taking doctrine without encroaching upon the judiciary's responsibility to interpret the Constitution.

In summary, H.R. 2372 interferes with the relationship between local and federal governments, creates a substantial new workload for overburdened federal judges and elevates the rights of landowners above other civil rights claimants. It is not surprising that last year's version (H.R. 1534) of this bill was opposed by virtually every major membership organization representing state and local government and state and local courts, as well as numerous environmental, planning, religious, labor and historic preservation organizations. We share the

view expressed by the National Governors' Association, the National League of Cities and the U.S. Conference of Mayors in their letter to you of October 21, 1997 in opposition to H.R. 1534:

> "[T]he Founding Fathers never intended the federal courts as the first resort in resolving community disputes among private property owners. Rather, these problems should be settled as close to the affected community as possible. By removing local disputes from the state and local to the federal level, H.R. 1534 violates this principle and undermines basic concepts of federalism."

We request that the Committee not approve H.R. 2732.

Sincerely,

BILL LOCKYER
Attorney General

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We respectfully request that the Committee not approve H.R. 2732.

Sincerely,

Bill Pryor
Attorney General of Alabama

Bruce M. Bothello
Attorney General of Alaska

Janet Napolitano
Attorney General of Arizona

Bill Lockyer
Attorney General of California

cc: Congressman Canady, Chair of the Subcommittee on the Constitution
Ranking Minority Member Watt, Subcommittee on the Constitution
Members of the House Judiciary Committee

Ken Salazar
Attorney General of Colorado

Richard Blumenthal
Attorney General of Connecticut

M. Jane Brady
Attorney General of Delaware

Robert A. Butterworth
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Thurbert E. Baker
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Carla J. Stovall
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Richard P. Ieyoub
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Jennifer Granholm
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Mike Hatch
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Joseph P. Mazurek
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A Communication From the Chief Legal Officers
Of the Following States

September 24, 1997

The Honorable Henry J. Hyde
Chairman, Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515-6216

Dear Chairman Hyde:

We, the Attorneys General of Alabama, Alaska, Arizona, California, Connecticut, Delaware, Florida, Georgia, Guam, Hawaii, Idaho, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Rhode Island, Tennessee, Texas, Vermont, Virgin Islands, Washington, Wisconsin, and Wyoming, are writing to express our strong opposition to H.R. 1534. Entitled an act "to simplify and expedite access to the Federal courts for injured parties...," H.R. 1534 invades the province of state and local governments and directs federal judges to intrude into matters pending before state and local officials and courts. Not only does the bill catapult many state land use decisions into federal court but it also authorizes defendants in any type of state or local case, civil or criminal, to seek the intervention of a federal judge.

We are also concerned that H.R. 992, "the Tucker Act Shuffle Relief Act," also pending in this committee, may be construed to subject state defendants to unconstitutional exercises of judicial power by judges not appointed under Article III of the Constitution.

H.R. 1534

Section two of H.R. 1534 literally compels federal judges to intrude into state and local matters. It does so in three very damaging ways. First, it prohibits federal judges from abstaining from hearing issues which are pending in important state adjudicative proceedings. Second, it restricts federal judges from certifying state law questions to state courts. Third, it orders federal judges to hear "takings" claims before state or local land use proceedings are completed and in disregard of state procedures to pay just compensation.

Abolishing "Younger" Abstention

Section two [by adding new 28 U.S.C. § 1343(c)] would effectively abolish "Younger abstention" in any case brought alleging a deprivation of federal constitutional rights. The section would amend 28 U.S.C. § 1343 by prohibiting a federal court from abstaining in an action where no violation of state law is alleged. Younger v.

Harris, 401 U.S. 37 (1971), held that federal courts must almost always dismiss civil rights suits challenging on-going state criminal prosecutions. The Younger doctrine also prevents federal courts from intervening in pending state civil or administrative adjudicatory proceedings which implicate important state interests and which provide full and fair opportunity to resolve the federal constitutional claim. Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986). This doctrine has been applied to protect the jurisdiction of state agencies and courts to hear and decide criminal cases, prison discipline, attorney or doctor disciplinary matters, and drivers license revocation, for example.

Abstention assures that important State proceedings will not be disrupted. State administrative processes are designed to accommodate the many interests involved in diverse areas of state regulation. (For example, a medical doctor charged with incompetence cannot now jump into federal court to avoid peer review by other doctors in a licensing case. Often, an incompetent doctor might prefer to take a chance with a "battle of the experts" in federal court on an allegation of denial of equal protection, for example.) Abstention not only preserves important State interests in its own decision-making processes but also assures that federal judges not reach constitutional issues unnecessarily. Abstention protects state and federal courts from conflicts and wastes of resources. If a lawyer can craft an abstention-proof petition by simply omitting state law claims, many cases will be tried in state and federal proceedings simultaneously, thus giving defendants in state criminal or disciplinary proceedings two opportunities to derail a state prosecution. State and local prosecutors would be forced to expend resources in simultaneously prosecuting and defending lawsuits where the state proceeding could effectively resolve all federal and state claims.[1]

Restricting the Certification of State Law Questions

Section two would order federal courts not to certify questions of State law to State courts unless the State law question will significantly affect the merits of the Federal claim and the question is "so unclear and obviously susceptible to a limiting construction as to render premature a decision on the merits of the constitutional or legal issue in the case." It is unclear whether this section is intended to abolish "Pullman abstention" in such cases in favor of a national process for certification of state law questions. Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941), held that federal courts should abstain where a case raised unclear questions of state law and a state court decision on those questions might eliminate the need to resolve the federal constitutional question. So, for example, it might be appropriate for a federal court to abstain from hearing a challenge to a state statute regulating sexually explicit materials where a state court adjudication could provide a limiting construction of state

[1] Federal suits challenging a prosecution can be very disruptive to an overworked prosecutor's office even though the claims are baseless. For example, in a case from Black Hawk County, Iowa, on the eve of trial of weapons offenses and terrorism charges, the defendants filed an action under 28 U.S.C. § 1983 alleging violations of the Second Amendment and requesting a temporary restraining order. The Federal court abstained. Under this bill, the prosecutor would be forced to brief the merits of a motion to dismiss or resistance to the temporary restraining order while trying the state law action.

law and where simultaneous federal and state proceedings might result in two different interpretations of a state statute. See, e.g., Almodovar v. Reiner, 832 F.2d 1138, 1140 (9th Cir. 1987). Certification of state law questions to the State's highest court is also helpful but certification is not a substitute for Pullman abstention in cases where there are issues of fact because the state appellate court cannot conduct an evidentiary hearing.

About two-thirds of the states have adopted statutes providing for certification of state law questions. The reason is obvious: state courts are the ultimate arbiters of state law. Federal district courts should not make educated guesses at the meaning of state law when a mechanism exists to assure that a definitive state law interpretation can be had.

Federalization of Land Use Disputes

Section two, new 28 U.S.C. § 1343(e), would require federal courts to hear "takings" cases prematurely and in lieu of state court compensation processes. This will involve federal courts in local land use disputes, defeat local procedures designed to balance interests of neighboring land owners, and force local zoning procedures to conform to a federal procedural mandate.

This subsection states that a claim for "the deprivation of a property right or privilege secured by the Constitution" is ripe for federal court action if a definitive decision regarding the extent of permissible uses on the property is made by "any person" acting under color of state law and if the party has applied for one appeal or waiver. Further, persons are not required to exhaust state judicial remedies before suing in federal court (overruling Williamson County Regional Planning Comm'n. v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985)).

Property law is traditionally a matter of intense State and local concern. In most states, land use is primarily a local function. Local zoning and land use ordinances typically provide for an initial staff decision on a building or use permit but with built-in appeal and variance procedures to assure consideration of competing interests, to mitigate undue hardship, and to provide official accountability and consistency by having boards of adjustment or city councils render the final decision. Further, state laws recognize that the Constitution prohibits takings without just compensation. The states all have administrative and judicial processes designed to prevent takings without just compensation. These procedures typically provide for judicial review to prevent a "taking" under the ostensible exercise of the police power and second, provide inverse condemnation actions to assure that just compensation is paid if the governing body refuses to rescind the "taking."

Sovereign Immunity

The invasion of State sovereignty in favor of federal courts would be accompanied by a high cost to State and municipal treasuries. The bill encourages developers and others to drop out of processes designed to work out disputes and to instead sue for damages and attorneys fees in federal court.

We question whether federal courts could constitutionally hear the suits against State officials (to be paid from State treasuries) permitted by the proposed amendment of 28 U.S.C. § 1343(e) under H.R. 1534. Because the Fifth and Fourteenth Amendment prohibit only those takings made without payment of just compensation, a statute that authorizes damages remedies before the State has determined whether to "take" the property or the amount of compensation is not merely a procedural statute. Congress lacks the authority to interfere so directly in the operation of State and local governments and to authorize suits against the States in federal court beyond its power to enforce the Fourteenth Amendment. See Printz v. United States, 521 U.S. __, 138 L.Ed.2d 914, 117 S.Ct. __ (1997) (Congress has the power to regulate individuals, not States); City of Boerne v. Flores, 521 U.S. __, 138 L.Ed.2d 624, 117 S.Ct. __ (1997) (Congress lacks the power to substantively re-define constitutional limitations on the States); Seminole Tribe v. Florida, 517 U.S. __, 134 L.Ed.2d 252, S.Ct. 1114 (1996) (Congress lacks power to abrogate State's Eleventh Amendment immunity under the Commerce or Indian Commerce Clauses or to expand federal jurisdiction beyond that provided in Article III).

H.R. 992

We are concerned that H.R. 992, expanding the jurisdiction of the Court of Federal Claims to invalidate federal agency action, will subject State and local governmental officials to the jurisdiction of this legislative court. While on its face, H.R. 992 extends to an "agency action" adversely affecting private property interests and the term "agency action" is defined to encompass only actions of the United States, we are concerned that inclusion of a definition for the term "state agency action" may be construed as suggesting the availability of Tucker Act relief against States or their officials. If these "State agency actions" are subject to relief in the Court of Federal Claims, then we are very concerned about the wisdom and constitutionality of a non-Article III court invalidating state agency action or awarding damages against States and local government. State officials are also frequently parties to challenges to federal agency action (which is often a means of challenging state projects, such as roads, receiving federal funds). We are concerned that property owners can elect a distant forum to litigate issues of State and local concern and avoid not only the applicable state court but also the applicable federal district and appellate courts. Others affected by regulation of public concern do not have this option but would be subjected to suit in an alien forum.

For all of these reasons, we request that the Committee not approve H.R. 1534 and H.R. 992.

Very truly yours,

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cc: Honorable John Conyers, Jr.
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Testimony of Larry Curtis
Mayor
Ames, Iowa

on Behalf of
National League Of Cities
The United States Conference of Mayors

before the

Senate Judiciary Committee
Property Rights
S. 1204

October 7, 1997

My name is Larry Curtis, and I am the mayor of Ames, Iowa. I am testifying today on behalf of the citizens of Ames, Iowa, as well as the National League of Cities and the U.S. Conference of Mayors. The National League of Cities, which I am representing this morning, is composed of elected Republican, Democratic and Independent leaders of cities of all sizes. It is the largest and oldest organization representing the nation's cities and towns. I am here today to express strong opposition to S. 1204.

We have grave concerns about this bill. We strongly oppose it. We believe it would mark an extraordinary intrusion into one of the most historic and traditional rights and responsibilities of cities in this country, that it would impose a significant new unfunded federal mandates - especially on smaller cities, and that it would sharply interfere with the ability of American citizens in every community to exercise their traditional authority to determine the future of their and our communities.

At the very least, Mr. Chairman, we are concerned about the rush to judgment without a full foundation of hearings, much less a careful analysis of what the impact on citizens, taxpayers, and our communities would be. That this bill proposes an approach that is so contrary to the spirit of devolution and so opposite to the commitments to halt federal intrusion into local affairs and new federal burdens on local taxpayers is especially troubling.

We believe that activities such as franchising, zoning, issuing permits and licenses, all municipal code development and enforcement are fundamental responsibilities of cities and towns to ensure public health and safety and to protect the environment. Our national municipal policy opposes any preemption. It states that when a clear and compelling need arises, Congress must explicitly express its intent to preempt, and Congress must accompany any such preemption with a timely intergovernmental impact analysis, including costs.

We oppose federal regulations, statutes, or amendments which place restrictions on state and local government actions regulating private property or requiring additional compensation beyond the Fifth Amendment of the U.S. Constitution.

There has been no mandates or impact study done for this Congress. There has been no effort to sit down with us and demonstrate there is a compelling need for the United States Congress to interfere with one of the most traditional roles and responsibilities of communities in this country since its founding.

The intent seems to be to upset the traditional American methods we have relied upon in cities and towns to address land use and zoning issues, such as where to locate a filling station, an industrial facility, a movie theater or store engaged in adult entertainment. In my city, we have nearly a dozen boards and commissions composed of citizens to make decisions on planning and zoning, historic preservation, housing, parks and recreation, and zoning appeals. It is difficult to imagine issues more important to the citizens in my city than those which directly affect their assessed property values and quality of life. As

such, we find it especially difficult to understand why and how the federal courts should suddenly be held over the heads of these citizen boards and commissions and, ultimately, all local taxpayers.

Perhaps the most serious aspect of this proposed legislation is what it will cost. The bill is an invitation to sue local governments - early and often. This will impose a significant burden on smaller cities and towns, those with the least in-house legal resources. It will subject those citizens and those communities to significant financial pressures. It will substitute outside legal threats and the federal judiciary in place of the traditional local, citizens' land use agencies that have historically decided issues of land use and zoning. There is simply no record of a compelling need to act in such a hasty fashion to rewrite our American federal system and subject our smallest communities to federal intrusion.

Under current law, federal law requires developers and other property owners to make every effort to resolve land use disputes with local officials before going to federal court. This respect for our local processes helps ensure that citizens in our city make the land use decisions, not federal judges. It helps ensure there is a sufficiently developed factual record before a federal court ever becomes involved. In most instances, of course, federal courts properly abstain from deciding novel or complex issues of state law so state tribunals can decide those issues.

This bill would turn this traditional, common sense federal approach on its head. It would be a boondoggle for plaintiffs' attorneys and produce litigation in federal courts before a final decision, which might come out in the litigant's favor, was even reached by a city. The bill would turn over to the federal courts an unprecedented role in interpreting state laws and local ordinances.

Let me provide a perspective from my own community:

Ames, in the northeastern quarter of the State of Iowa, has a population of 47,000. We are a diverse community -- a service center for a robust agricultural community, the seat of the State's largest university, and home to a small but thriving manufacturing and service economy. Ames also is a beautiful community and we endeavored to protect the character of the community through a variety of zoning and subdivision regulations, historic district designations, and other measures. While I have the privilege of working with a very dedicated and skilled professional staff, many of the most important decisions in our community are made by local business leaders, professionals of one sort or another, as well as ordinary citizens who serve as volunteers on city boards and committees. These boards and committees include, for example, the Building Code Board of Appeals, the Board of Electrical Examiners and Appeals, the Historic Preservation Commission, the Housing Board of Appeals, the Planning and Zoning Commission, and the Zoning Board of Adjustment.

Ames is in many ways typical of smaller cities and towns across America in which government is a community effort involving citizens from all walks of life. All told,

there are some 35,935 thousand cities and towns in the United States. While some cities have comparatively large budgets and staff, most communities have small populations, few professional staff, and small budgets. 97 percent of the cities and towns in America have populations of less than 25,000; 91 percent have populations of less than 10,000; and 52 percent have populations of less than 1,000. Virtually without exception, cities and towns with populations under 10,000 persons have no full-time professional legal staff. As a result, these smaller communities must retain outside legal counsel each time a suit is filed against them. In short, lawsuits filed against smaller towns and cities can impose an enormous financial burden on the citizens and taxpayers of these communities.

Let me cite one example to illustrate the potential magnitude of the problem. Several years ago, the nation's fourth largest pork producer started operating a 50,000-head hog farm in rural Lincoln Township in Putnam County, Missouri. Township officials, who represent a community of only a few hundred residents, objected that the operation violated the local zoning ordinance. The company countered with a lawsuit complaining that the town's attempt to enforce its zoning represented a taking, and sought damages of $8,000,000. It is obvious that small communities are in a weak position to defend against this type of lawsuit, and the mere cost of defending against such a suit could be ruinous to taxpayers.

S. 1204 would have a number of unfair, negative consequences for cities and towns across America. The bill would result in the filing of more lawsuits against cities and towns, allow litigation to be commenced earlier, prolong the cost and duration and litigation, and ultimately increase the risk that local communities would be required to agree to expensive settlements. In addition, the bill would greatly encourage the filing of land use litigation in federal court rather than state court. In many cases, having to defend litigation in federal court will be more costly than litigating the same claim in state court. While a handful of lengthy, procedurally tangled cases have been cited as evidence of the need for this bill, in my experience the local land use regulatory process in most instances works fairly and efficiently for all concerned. In my view, there is no need for this type of drastic legislative action, much less an enactment of this type at the Federal level.

I would like to outline what I see as the four basic problems with this bill:

First, this bill would violate the bipartisan commitment made by Congress to end unfunded mandates on local governments. This proposal would impose large new costs on local communities, in particular in the form of higher legal fees. I respectfully ask whether Congress also intends to ensure that attorneys from the Department of Justice would be assigned to defend local communities against the additional lawsuits that would be generated by this legislation. Alternatively, would Congress be willing to guarantee federal funding to pay increased litigation costs. To be blunt, if Congress thinks it is fair and appropriate to subject local governments to increased litigation costs -- a premise I obviously dispute -- then Congress should at least be willing to defray the costs to local governments resulting from this new federal policy.

At the very minimum, I would respectfully suggest that the Committee hold several hearings at different locations around the country to gather information about the local fiscal impact of this legislation. As a matter of simple fairness, the Committee should hear from cities and towns across America, most particularly the smallest towns most likely to be most dramatically affected by this bill, before moving forward.

Second, this bill would interfere with the ability of locally elected officials to protect public health and safety, the environment, and property values in their communities. By granting developers a number of significant new procedural advantages in land use litigation, the bill would provide developers and other claimants greater leverage to challenge local land use planning and zoning regulations. In simple terms, the bill represents a congressional license for legal extortion of local governments.

Third, the bill is inconsistent with Congress' renewed commitment to the preservation of Federalism. There is perhaps no other governmental function performed by cities and towns which is so clearly understood to be a local responsibility than local planning and zoning. In accordance with this traditional view, the overwhelming majority of land use litigation takes place in the state courts. At the same time, the U.S. Supreme Court and other federal courts, in Williamson County and other decisions, has developed a body of precedent which respects the traditional responsibility of local government over local land use issues. This bill, on the other hand, would encourage the filing of legal challenges to local land use regulations in federal court. In fact, because the bill would provide significant procedural advantages in federal court as compared to state court, the bill would likely result in the transfer of the overwhelming majority of land use cases from state to federal court. The result would be far greater federal court involvement in traditionally local activities. Furthermore, the bill would undermine the development of a consistent body of precedent developed in the state courts interpreting and enforcing the land use laws of the particular state.

In many areas -- from welfare reform to administration of the EPA wetlands program -- the federal government has been moving in the direction of restoring the rights and responsibilities of states and local government. In many other arenas, Congress has taken to heart the view that the states are truly the laboratories of democracy. This bill, however, goes in completely the opposite direction. This represents national use legislation -- national land use legislation with a particular slant, but national land use legislation all the same.

Finally, by encouraging the premature filing of lawsuits, the bill would interfere with efforts of local governments across the country to work with developers to address their proposals in the context of the overall objectives of the community. Under current law, developers are not permitted to proceed to court immediately after an initial development proposal, but must work with the local community to determine what can actually be permitted consistent with the community's development and conservation objectives. This requirement of existing law fosters locally based, collaborative process which is in the best interests of cities and towns as well as most developers. The bill would tend to

short circuit this process and result in premature, adversarial litigation.

In closing, I want to emphasize that the City of Ames, along with the National League of Cities, values and supports private property rights. Also, the League recognizes that, across the thousands of local government jurisdictions in this country, local governments sometimes make mistakes in addressing difficult and complex land use issues. The solution to these isolated problems is not a one-size fits all mandate handed down by Congress. In our view, the courts have, over time, developed a reasonably balanced approach -- from both a substantive and a procedural standpoint -- in handling taking property claims. We urge Members of Congress to leave to the Courts the responsibility of devising the evolving solutions to these admittedly complex issues.

Thank you for the opportunity to testify. I would be pleased to respond to any questions that you or other members of the Committee may have.